IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. ——— ORIGINAL.

THE STATE OF OKLAHOMA, UPON THE RELATION OF HOWARD C. JOHNSON, BANK COMMISSIONER, *Plaintiff*,

v.

R. M. COOK, *Defendant*.

MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT.

FRANCIS C. BROWN,
HOUSTON E. HILL,
Attorneys for the State of Oklahoma Upon the Relation of Howard C. Johnson, Bank Commissioner, Plaintiff.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

R. M. COOK, *Defendant*.

MOTION FOR LEAVE TO FILE COMPLAINT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the State of Oklahoma upon the Relation of Howard C. Johnson, Bank Commissioner of the State of Oklahoma, and moves the Court for leave to file the appended complaint against R. M. Cook, citizen of another State than the plaintiff. The appended complaint presents a controversy of a civil nature arising between a State and a citizen of another State for the enforcement of the statutory liability of the defendant, arising out of the insolvency of a bank organized under the laws of the State of Oklahoma in which the defendant was and is a shareholder.

In the month of October, 1936, plaintiff commenced an action in the District Court of the United States for the

Western Division of the Western District of Missouri against the defendant for the recovery of the claim here involved and on motion of the defendant the Court dismissed the complaint for want of jurisdiction on the ground that the State of Oklahoma was the real party in interest, was suing in its sovereign capacity and could not for these reasons maintain its action in the United States District Court. A copy of the Court's memorandum opinion upon the motion to dismiss is attached hereto as Exhibit B and incorporated herein by reference.

In an action heretofore brought by plaintiff against the defendant in the Circuit Court of Jackson County in the State of Missouri for the enforcement against the defendant of the liability here in suit, the Court ruled that the plaintiff could not recover upon evidence showing (1) the provisions of the Oklahoma law hereinbefore set forth, and (2) the finding of the Bank Commissioner that the bank was insolvent, but must show the actual cash value of the assets in the bank at the time it was closed and that such assets were insufficient to pay its liabilities and that the collection of the added liability of shareholders, including defendant, was necessary to provide for the payment of such liabilities. The production of such evidence, under the Court's ruling, would have required a detailed appraisal of each asset owned by the bank and substantiation of all steps taken in the liquidation by the Bank Commissioner, and as the cost of producing such evidence would have rendered the proceeding fruitless, the plaintiff dismissed the action without prejudice and therefore seeks to enforce its claim by this original action in this Court.

FRANCIS C. BROWN,
HOUSTON E. HILL,
Attorneys for the State of Oklahoma Upon the Relation of Howard C. Johnson, Bank Commissioner, Plaintiff.

EXHIBIT B.

In the District Court of the United States for the Western Division of the Western District of Missouri

No. 9607.

STATE OF OKLAHOMA upon the relation of HOWARD C. JOHNSON, *Plaintiff*,

v.

R. M. COOK, *Defendant*.

MEMORANDUM OPINION ON MOTION TO DISMISS.

This is a suit by the State of Oklahoma at the relation of its bank commissioner, Howard C. Johnson, to enforce a double liability or superadded liability on the stock of a bank in process of liquidation after failure.

It appears from the statute law of Oklahoma that, in cases of banks in liquidation, the commissioner on behalf of the state is charged with the responsibility of collecting the assets of such banks and then disbursing them to creditors in accordance with their rights. The bank commissioner has brought suit in this court to collect the liability assessed on stock owned by the defendant.

It is the contention of the defendant that this is a suit by the State of Oklahoma and since it is not a person there is no such diversity of citizenship as to confer jurisdiction on this court.

The only inquiry, therefore, is whether the State of Oklahoma is the real party in the case.

1. As said in *Ex Parte State of New York No. 1*, 256 U. S. 490, l. c. 500:

> "As to what is to be deemed a suit against a State, the early suggestion that the inhibition might be confined to those in which the State was a party to the record * * * has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties but by the

essential nature and effect of the proceeding, as it appears from the entire record."

2. Moreover, as and for another postulate to a decision of this case, it was held in *Sim* v. *Edenborn*, 242 U. S. 131, l. c. 135:

> "that, as to doctrines of commercial law and general jurisprudence, the former (Federal courts), exercise their own judgment, 'But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.' "

The question here does not involve any doctrines of commercial law and general jurisprudence. It becomes, therefore, the duty of the court to ascertain what construction has been placed upon the rights and duties of the bank commissioner of the State of Oklahoma by the courts of that state.

3. Prior to the construction of a statute of a state by its highest authority, the Federal court in a proper case will put its own construction upon such statute. It is not required that this be done in the case at bar for the reason that the relationship of the bank commissioner to the State of Oklahoma has been defined by numerous Oklahoma decisions.

By the sharply divided court in *Lankford et al.* v. *Platte Iron Works*, 235 U. S. 461, the Supreme Court held even in advance of a decision by the courts of the State of Oklahoma that a similar suit by the bank commissioner was on behalf of the state and that the state in fact was the real party in interest.

4. It is contended by the plaintiff that the decisions holding the state to be a party in similar suits was occasioned by the fact that the State of Oklahoma administered on behalf of bank depositors a guaranty fund. Such fund did not

belong to the state in the sense that it was a part of the state's revenue, but was simply administered by the state for the benefit of bank depositors. It was rather a possessory right.

Such decisions were not put upon the ground of the ownership or control of the fund, but purely upon the basis of the administrative agency of the state. This was the course of a decision in the *Lankford case, supra.*

In discussing the case of *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151 in the *Lankford case*, the Court said by way of analogy:

> "A duty, therefore, was imposed upon the commission to collect the assets of the dispensary and pay its debts and it was as directly expressed as was the duty imposed upon the Banking Board in the pending case." (l. c. 472.)

5. In the following Oklahoma cases the Supreme Court of that state has held that the state was the real party in suits of a like nature: *Lovett et al. Creek County Commissioner* v. *Lankford, State Bank Commissioner*, 47 Okla. 12; *Bailey* v. *Lankford, Bank Commissioner*, 54 Okla. 692.

6. Moreover, in many other cases the Supreme Court of Oklahoma has held that where the state was seeking to collect the assets of closed banks, through the bank commissioner, the statute of limitations would not run because the state in its sovereign capacity was a party. It is so held in *State ex rel. Freeling* v. *Smith*, 77 Okla. 274; *State* v. *Ware*, 82 Okla. 130; *State etc.* v. *McLaughlin, Adm'r*, 159 Okla. 4; *Yeargain* v. *Shull, Bank Comm'r*, 149 Okla. 211.

7. Since the repeal of the guaranty fund law, the Supreme Court of Oklahoma has adhered to its ruling by holding in *Richard* v. *State of Oklahoma, ex rel Barnett, Bank Comm'r*, 176 Okla. 537, that the state, being a party, the statute of limitations would not run.

8. It is not necessary to cite authorities to the effect that the state is not a person within the purview of the national constitution conferring jurisdiction upon the Federal courts. The following authorities support the proposition: *Postal Telegraph & Cable Co.* v. *State of Alabama,* 155 U. S. 482; *Porto Rico* v. *Russell & Co.,* 288 U. S. 476; *City Bank Farmers Trust Co.* v. *William A. Schnader, etc.,* 291 U. S. 24. The same rule was announced in *Cargile, et al.* v. *New York Trust Co.,* 67 Fed. (2d) 585.

The State of Oklahoma, being the real party in interest, it cannot maintain its suit in the Federal court because of the lack of diversity of citizenship. Accordingly, the petition will be dismissed for want of jurisdiction. IT IS SO ORDERED. Exception allowed to plaintiff.

Kansas City Missouri, January 29, 1937.

ALBERT L. REEVES,
United States District Judge.

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, A. L. Arnold, Clerk of the United States District Court in and for the Western District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original Memorandum Opinion on Motion to Dismiss in the case of *State of Oklahoma* upon the relation of *Howard C. Johnson,* v. *R. M. Cook,* No. 9607, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Kansas City this 6th day of October, A. D. 1937.

A. L. ARNOLD,
Clerk.

(Seal)

By E. O'KEEFE,
Deputy Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. ——— ORIGINAL.

THE STATE OF OKLAHOMA, UPON THE RELATION OF HOWARD C. JOHNSON, BANK COMMISSIONER, *Plaintiff*,

v.

R. M. COOK, *Defendant.*

COMPLAINT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The plaintiff, State of Oklahoma, upon the Relation of Howard C. Johnson, its duly appointed, qualified and acting Bank Commissioner, brings this action against the defendant, R. M. Cook, a citizen of the State of Missouri, and for cause of action alleges:

I.

The plaintiff, State of Oklahoma, is one of the States of the United States of America. Howard C. Johnson, on whose relation the State of Oklahoma appears herein, is the duly appointed, qualified and acting Bank Commis-

sioner of the State of Oklahoma. The defendant, R. M. Cook, is a citizen and resident of the State of Missouri and the Western Judicial District thereof.

II.

This is a case or controversy of a civil nature between a State and a citizen of another State. The nature of the action is to recover the statutory or additional liability of the defendant, R. M. Cook, for the amount of stock owned by him as a shareholder of an insolvent bank organized under the laws of the State of Oklahoma.

III.

At all times herein mentioned it was, and now is, the law of the State of Oklahoma that when the Bank Commissioner of the State of Oklahoma takes possession of a bank organized under the laws of the State of Oklahoma and its assets, and proceeds to wind up its affairs and enforce the personal liability of its stockholders, officers and directors, the acts of the Bank Commissioner are the acts of the State of Oklahoma in its sovereign capacity and that the acts of the State of Oklahoma in respect to the liquidation of insolvent banking corporations organized under the laws of the State of Oklahoma are acts in its sovereign capacity, and that title to the assets of a bank organized under the laws of Oklahoma vests in the state upon the insolvency of the bank.

IV.

The provisions of the Constitution and Statutes of the State of Oklahoma hereinafter set forth were the law in the State of Oklahoma at all times herein mentioned and this action is prosecuted pursuant to such provisions, to wit:

Article 14, Section 1, Oklahoma Constitution:

> "General laws shall be enacted by the legislature providing for the creation of a Banking Department, to be under the control of a Bank Commissioner, who

shall be appointed by the Governor for a term of four years, by and with the consent of the Senate, with sufficient power and authority to regulate and control all State Banks, Loan, Trust and Guaranty Companies, under laws which shall provide for the protection of depositors and individual stockholders."

Section 9147, Oklahoma Statutes 1931:

"The Governor shall appoint, by and with the advice and consent of the Senate, a Bank Commissioner, who has been a tax payer for three years prior to appointment and who shall hold office for a term of four years, and until his successor is appointed and qualified."

Section 9130, Oklahoma Statutes 1931:

"The shareholders of every bank organized under this article shall be additionally liable for the amount of stock owned, and no more."

Section 9170, Oklahoma Statutes 1931:

"A bank shall be deemed to be insolvent; first, when the actual cash market value of its assets is insufficient to pay its liabilities; second, when it is unable to meet the demands of its creditors in the usual and customary manner; third, when it shall fail to make good its reserve as required by law."

Section 9172, Oklahoma Statutes 1931:

"Whenever any bank or trust company organized or existing under the laws of this State shall voluntarily place itself in the hands of the bank commissioner, or, whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this State shall have been adjudged to be forfeited, or whenever the bank commissioner shall became satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers, and directors."

Section 9173, Oklahoma Statutes 1931, in part:

"* * * The Bank Commissioner shall have power and authority to institute and prosecute all suits necessary for the liquidation of the assets of the insolvent corporations taken over by him and such suits shall be brought in the name of the State of Oklahoma, on the relation of the Bank Commissioner. If, after the liquidation of such insolvent corporation, wherein the depositors and creditors of said insolvent corporation shall have been paid in full, there remain in the hands of the Bank Commissioner any assets, such remaining assets shall revert to the stockholders of said insolvent corporation. Nothing in this amendment shall operate to deprive the State of Oklahoma of any lien that it may have on the assets of any bank that may have been adjudged insolvent prior to the passage and approval of this Act."

Section 9174, Oklahoma Statutes 1931:

"On taking possession of the property of any bank, the Bank Commissioner shall forthwith give notice of such fact to all banks, trust companies and individual firms or persons holding or in possession of its assets. No bank, trust company, savings bank, firm or individual, knowing of such taking possession by the Bank Commissioner or notified as aforesaid, shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred against any of its assets. Such bank may, with the consent of the Bank Commissioner, resume business upon such conditions as may be approved by him. Upon taking possession of the property and business of such bank the Commissioner is authorized to collect money due it and do such other acts as are necessary to conserve its assets and business and shall proceed to liquidate the affairs thereof, as hereinafter provided. The Commissioner shall collect all debts due and claims belonging to it and, upon the order of the District Court of the County in which it is doing business may sell or compound all bad or doubtful debts and, on like order, may sell all its real and personal property on such terms and at public or private sale, as the Court shall direct and

shall enforce the liabilities of stockholders of such bank. The stockholders' liability of such bank shall become due and payable upon the date of the taking possession of the property of any such bank by the Bank Commissioner, and the order of the Bank Commissioner finding the bank to be insolvent shall be conclusive evidence of that fact and the liability of said stockholders shall bear interest at the rate of six (6%) per cent per annum, from the date of the taking possession of the property of such bank by the Bank Commissioner."

V.

Pursuant to law, on or about May 22, 1931, C. G. Shull, who then was the duly appointed, qualified and acting Banking Commissioner of the State of Oklahoma, caused an examination to be made of the affairs of the Osage Bank of Fairfax, Osage County, State of Oklahoma, from which he became satisfied and determined that the bank was insolvent; on said date he made an order finding the bank to be insolvent and took possession of the bank and its assets for the purpose of liquidating the same, and proceeded to wind up its affairs and enforce the personal liability of its stockholders, officers and directors and to pay its creditors and depositors, the bank having been organized under the laws of the State of Oklahoma. A copy of the order of the Bank Commissioner finding and adjudging the bank to be insolvent, as hereinbefore set forth, is attached hereto as Exhibit A and made a part hereof by reference.

VI.

On the 22nd day of May, 1931, the said Osage Bank of Fairfax was, and at all times since has been, insolvent in that (1) its liabilities to its depositors and creditors exceeded the actual cash value of its assets by a substantial margin and (2) it was, and at all times since has been unable to meet the demands of its creditors in the usual and customary manner.

VII:

On May 22, 1931, the day on which the Bank Commissioner took possession of the said Osage Bank of Fairfax and its assets and proceeded to wind up its affairs, as hereinbefore set forth, the defendant, R. M. Cook, was the owner of sixty-nine (69) shares of the capital stock of said bank, each share being of the par value of One Hundred Dollars ($100). The ownership of said shares of stock was evidenced by a certificate issued by said bank to the defendant, R. M. Cook, to wit, certificate No. 32, which at said time was, and at all times since has been, in the possession of the defendant. By reason of the premises, on May 22, 1931 defendant, as a shareholder of the bank, became, and at all times since has been, liable to the State of Oklahoma upon the relation of its Bank Commissioner in the sum of Sixty-nine Hundred Dollars ($6900), together with interest thereon from May 22, 1931 until paid, at six (6%) per cent per annum, the rate prescribed by law of the State of Oklahoma.

VIII.

Immediately after taking possession of the said bank and its assets C. G. Shull, who was then the duly appointed, qualified and acting Bank Commissioner of the State of Oklahoma, made demand upon the defendant for payment of his liability as a shareholder of the bank, to wit, the sum of Sixty-nine Hundred Dollars ($6900). Thereafter, to wit, during the month of September, 1931, the defendant paid the Bank Commissioner the sum of Twenty-three Hundred Dollars ($2300) in partial satisfaction of his liability and the balance in the sum of Forty-Six Hundred Dollars ($4600), together with interest thereon at the rate of six per cent (6%) per annum from May 22, 1931, until paid, remains due, owing and unpaid, and although plaintiff has made frequent demands upon the defendant for payment thereof, the defendant has failed, neglected and refused to pay the same.

IX.

The law of Oklahoma imposing the said additional liability upon shareholders was in effect at the time, and at all times since, the defendant became the holder of the shares of stock of the Osage Bank of Fairfax, herein referred to.

X.

All acts of the Bank Commissioner in connection with such liquidation have been taken with the approval and under the direction of the District Court of Osage County, State of Oklahoma, as provided by law. The Bank Commissioner has liquidated all of the assets of the bank which came into his possession, save and except the claim here in suit and certain other claims against other shareholders. The proceeds thus derived, after deduction of lawful expenses, have been paid over to the depositors and creditors of the bank in the form of dividends aggregating ninety-one per cent (91%) of the face amount of their claims. The enforcement of the claim against the defendant for the amount of his statutory additional liability as a shareholder of the bank is necessary for the further payment of claims of depositors and creditors of the bank, as the assets of the bank at all times herein mentioned were and are insufficient to pay its liabilities.

WHEREFORE, Plaintiff prays judgment against the defendant, R. M. Cook, in the sum of Forty-six Hundred Dollars ($4600), together with interest thereon at the rate of six

per cent (6%) per annum from May 22, 1931, until paid, and for costs herein incurred.

FRANCIS C. BROWN,
HOUSTON E. HILL,
Attorneys for the State of Oklahoma Upon the Relation of Howard C. Johnson, Bank Commissioner, Plaintiff.

UNITED STATES OF AMERICA,
STATE OF OKLAHOMA,
County of Oklahoma, ss:

Howard C. Johnson, having been first duly sworn upon oath, says: I am the Bank Commissioner of the State of Oklahoma and as such have authority to file in its name and on its behalf in the Supreme Court of the United States, the foregoing complaint and motion for leave to file the same. I am familiar with the averments contained in such complaint, and according to my information and belief, such averments are true in all respects.

HOWARD C. JOHNSON.

Subscribed and sworn to before me this 8th day of November, 1937.

VARVEL ROBERTSON,
Notary Public for the State of Oklahoma, County of Oklahoma.

(Notarial Seal)

My commission expires July 27, 1939.

EXHIBIT A.

STATE OF OKLAHOMA,
County of Oklahoma, ss.

ORDER.

In the office of the State Bank Commissioner in and for the State of Oklahoma. In re OSAGE Bank of FAIRFAX, Oklahoma. Now, on this 22nd day of May, 1931, the attention of the Bank Commissioner of the State of Oklahoma is called to the condition of the OSAGE Bank of FAIRFAX, Oklahoma.

And thereupon, after considering the recommendations of ..... a duly appointed Assistant Bank Commissioner, who has examined the affairs of said bank, and being familiar with the conditions of said bank, I am of the opinion that said bank should be closed and its books, records and assets be taken charge of by me as Bank Commissioner of Oklahoma, as provided by law, for the following reasons, to-wit:

1. That said bank is unable to meet the demands of its creditors in the usual and customary manner.
2. That the actual cash market value of its assets is insufficient to pay its liabilities.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED, by me as Bank Commissioner of the State of Oklahoma, that the OSAGE Bank, of FAIRFAX, Oklahoma, be and the same is hereby ordered closed forthwith; and I hereby take charge of all the books, records and assets of every kind and character belonging to said bank; and I further direct and order that W. E. CLARK, a duly appointed and acting Assistant Bank Commissioner, shall immediately take charge of said bank; that he shall forthwith post a notice on the front door of said bank, which notice shall be as follows:

May 22, 1931 (Date)

"This bank is in the hands of the State Bank Commissioner."

(signed) C. G. SHULL
"Bank Commissioner".

That he shall retain charge and custody of said bank and its books, records and assets, subject to my further orders. And it is further ordered that said Assistant Bank Commissioner shall prepare and file in this office, a complete and detailed liquidation report covering the condition and affairs of said bank, as soon as the same can be compiled.

WITNESS my hand and official seal this 22nd day of May, 1931.

(signed) C. G. SHULL,
Bank Commissioner.

ANSWER TO RULE TO SHOW CAUSE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. ..... Original.

THE STATE OF OKLAHOMA, UPON THE RELATION OF HOWARD C. JOHNSON, BANK COMMISSIONER, PLAINTIFF,

VS.

R. M. COOK, DEFENDANT.

ANSWER TO RULE TO SHOW CAUSE.

R. B. CALDWELL,
LYNN WEBB,
JOHN W. OLIVER,
Attorneys for Defendant.

BLATCHFORD DOWNING,
Of Counsel.

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Supreme Court of the United States

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VS.

R. M. COOK, DEFENDANT.

ANSWER TO RULE TO SHOW CAUSE.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Comes now R. M. Cook, defendant, appearing pursuant to the rule to show cause issued herein February 14, 1938, and as and for cause why leave should not be granted to file the Complaint, states that the alleged cause of action is not one in which a State is a party, within the meaning of Article III, Section 2, of the Constitution, conferring original jurisdiction upon this court. The Complaint asserts a cause of action for the benefit of individuals who are creditors and depositors of an

insolvent state bank. Plaintiff does not seek to assert a cause of action in her sovereign or essential governmental capacity, or for her own benefit, or to recover for any alleged injury or damage sustained in any such capacity.

As supplementary to the incomplete history of the instant litigation contained in plaintiff's motion for leave to file Complaint and Complaint, defendant states that plaintiff brought suit October 13, 1934, on the cause of action alleged in the case at bar, against defendant in the Circuit Court of Jackson County, Missouri. The following judgment indicates the disposition of this case made in the aforementioned court, May 26, 1936:

> *"State of Oklahoma on the Relation of W. J. Barnett, Bank Commissioner, Plaintiff, vs. R. M. Cook, Defendant. No.* 435802.
>
> Now on this day, by leave of court, plaintiff amends petition in the caption by substituting the name of Howard C. Johnson in lieu of W. J. Barnett herein.
>
> Now on this day this cause coming on regularly for trial, comes plaintiff in person and by attorney and defendant appears in person and by attorney and to try the issues herein joined comes the following jury, to-wit:. (jurors' names omitted) twelve good and lawful men from the body of the county, who were duly impaneled, tried and sworn; and the hearing of the evidence is begun and at the conclusion of the evidence on behalf of the plaintiff, plaintiff by attorney, in open court, dismisses this cause without prejudice.
>
> Wherefore, it is ordered and adjudged by the court that this cause be and the same is hereby dismissed without prejudice and that the defendant

go hence and have and recover of and from said plaintiff his costs herein incurred and expended and have therefor execution."

Thereafter, about August, 1936, plaintiff again sued defendant on the same cause of action in the District Court of the United States for the Southern Judicial District of California. There the venue as to the defendant as directed by Section 51 of the Judicial Code (28 U. S. C. A. 112) was improperly laid and said court sustained defendant's motion to quash service.

Thereafter, October 21, 1936, the plaintiff again sued defendant on the same cause of action in the District Court of the United States for the Western Judicial District of Missouri. There the defendant moved to dismiss the cause because no diversity of citizenship existed, as plaintiff alleged in its complaint as the ground upon which the jurisdiction of that court depended. The court sustained said motion to dismiss "because of the lack of diversity of citizenship." There was no appeal.

Summarizing the history of the litigation: Plaintiff has heretofore invoked the jurisdiction of the Circuit Court of Jackson County, Missouri, which clearly had and could now have jurisdiction. There was a trial on the merits in said circuit court. Plaintiff failed to make a case. When that court so indicated, plaintiff dismissed. Instead of perfecting an appeal from the circuit court's ruling, if it felt aggrieved, plaintiff elected to next sue in the federal district court in California where there was no venue; then in the federal district court in Missouri where it failed to allege jurisdictional grounds sufficient

to confer jurisdiction. *Postal Telegraph & Cable Co.* v. *State of Alabama,* 155 U. S. 482. Plaintiff now seeks to invoke the exercise of original jurisdiction here which, we respectfully submit, may not be properly invoked, for reasons first above stated and next hereinafter discussed.

Plaintiff's motion and Complaint depend upon Article III, Section 2 of the Constitution, for jurisdictional ground, alleging that a case or controversy between a state and a citizen of another state, is presented. This alone may not form a basis for exercise of this court's original jurisdiction. If deemed the practical equivalent of an allegation that this is a case in which a state is "a party," the facts negative the truth of the allegation when the proper meaning of "a party" is considered.

It is a settled rule that in order for a state to invoke the original jurisdiction of this court, there must be present a suit "by a state for an injury to it in its capacity of quasi sovereign." *Georgia* v. *Tennessee Cooper Co.,* 206 U. S. 230; *North Dakota* v. *Minnesota,* 263 U. S. 365; and cases cited therein. "The threatened invasion of its rights must be of serious magnitude and it must be established by clear and convincing evidence." *New York* v. *New Jersey,* 256 U. S. 296.

In the case at bar, the State of Oklahoma does not seek to recover for any injury or damage in her sovereign or governmental capacity, but is seeking to enforce a statutory cause of action to recover money for the benefit of individuals who are depositors and creditors of the Osage Bank of Fairfax, Osage County, Oklahoma. The State has not been damaged in any sense of the word.

In the event recovery is realized in the case at bar, plaintiff in its governmental capacity will not realize any of the fruits of this litigation. Under the statutes of Oklahoma, it may maintain this action for the depositors and creditors of insolvent banking institutions, and "after the liquidation of such insolvent corporation wherein the depositors and creditors of said insolvent corporation shall have been paid in full, there remain in the hands of the bank commissioner any assets, such assets shall revert to the stockholders of said insolvent corporation." Section 9173, Oklahoma Statutes, 1931.

The face of the complaint reveals who the beneficial parties to the cause of action asserted are. Said complaint states, "The bank commissioner has liquidated all of the assets of the bank which came into his possession, save and except the claim here in suit, and certain other claims against other shareholders. The proceeds thus derived, after the deduction of lawful expenses, have been paid over to the depositors and creditors of the bank in the form of dividends aggregating ninety-one per cent (91%) of the face amount of their claims. The enforcement of the claim against the defendant for the amount of his statutory additional liability as a shareholder of the bank is necessary for the further payment of claims of depositors and creditors of the bank as the assets of the bank at all times herein mentioned were and are insufficient to pay its liabilities."

The courts of Oklahoma have held that the governor has not the right to make the State a party to litigation enforcing the statutory causes of action provided for in the Oklahoma banking laws, although he is, under the

Oklahoma law, the supreme executive authority of that State. The only proper party plaintiff in enforcing said causes of action is "State of Oklahoma on the relation of the Bank Commissioner." *State ex rel. Murray, Governor, et al.* v. *Pure Oil Co.,* 169 Okla. 507, 37 Pac. (2d) 608; *Reeves* v. *Noble,* 88 Okla. 179, 212 Pac. 995. The statutory stockholders' liabilities are "designed solely for the benefit of creditors and constitute a fund available only when the bank is insolvent, and thus unable to meet its liabilities in full * * * it amounts, for all practical purposes, to a reserve or trust fund * * *." *State ex rel. Mothersead, Bank Com'r,* v. *Kelly,* 141 Okla. 36, 284 Pac. 65; *American Exchange Bank of Henryetta* v. *Rowsey,* 144 Okla. 172, 289 Pac. 726; *Griffin* v. *Brewer,* 167 Okla. 654, 56 Pac. (2d) 840.

The assets of insolvent banking institutions are liquidated "for the benefit of certain members of the public who were depositors in such institutions." *Richison, Adm'x,* v. *State ex rel. Barnett, Bank Com'r,* 176 Okla. 537, 56 Pac. (2d) 840.

It is plain that the beneficial parties to the cause of action asserted herein, are the depositors and creditors of the Bank of Osage.

It may be conceded that the State of Oklahoma, upon the relation of the bank commissioner, is, under the law of Oklahoma, a necessary party plaintiff. This fact, however, does not confer original jurisdiction upon this court.

"The mere fact that a state is plaintiff is not enough." *Florida* v. *Mellon,* 273 U. S. 12.

"We are of the opinion that the words in the Constitution conferring original jurisdiction on this court in a

suit 'in which a state shall be a party' are not to be interpreted as conferring such jurisdiction in every cause in which the state elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers generally." *State of Oklahoma* v. *Atchison, Topeka & Santa Fe Railroad Co.*, 220 U. S. 277.

Nor can the State of Oklahoma assert that she has a governmental or sovereign interest involved in the case at bar, because of her statutes, as *parens patriae* or as a representative of a group of its citizens. *Louisiana* v. *Texas*, 176 U. S. 1; *North Dakota* v. *Minnesota*, 263 U. S. 365, wherein this distinction is apparent; this court therein refused jurisdiction of the claim of North Dakota for damages to the land of a group of its individual inhabitants. *Kansas* v. *United States*, 204 U. S. 331.

In *New Hampshire* v. *Louisiana*, and *New York* v. *Louisiana*, 108 U. S. 76, a similar factual situation was presented. New Hampshire and New York, by virtue of statutes passed by the respective States, had acquired title to causes of action against defendant Louisiana. The beneficial parties to this litigation, had it been successful, would have been the former holders of the bonds which they owned and had assigned to New Hampshire and New York. This court denied jurisdiction because, although New Hampshire and New York had legal title to the causes of action, they did not have sufficient beneficial interest in said causes of action to entitle them to invoke the original jurisdiction of this court.

South Dakota v. *North Carolina*, 192 U. S. 286, illustrates a factual situation wherein the beneficial interest in the cause of action was vested in South Dakota, and accordingly the jurisdiction of this court was properly invoked. But in the case at bar, the situation is comparable to the New Hampshire and New York cases, *supra*, because the beneficial interest in this cause of action is in the individual depositors and creditors of the Osage Bank.

It may not be urged in this case that because the State of Oklahoma acquired title to the cause of action herein by virtue of statutory enactments within the police power of Oklahoma that this in and of itself is sufficient to entitle her to invoke the original jurisdiction of this court. There is no inconsistency in holding that the State of Oklahoma acquired her title in this manner and holding that she has no right to invoke the original jurisdiction of this court because she is not seeking to protect a governmental prerogative of its sovereignty. This is illustrated by a series of cases construing the liquor dispensary law of the State of South Carolina. In *Vance* v. *W. A. Vandercook*, 170 U. S. 438, the right of South Carolina to control the sale of liquor by a state controlled dispensary system was sustained as being within her police power. In *Murray* v. *Wilson Distillery Co.*, 213 U. S. 151, it was held that an action against the officers of the state dispensary commission was an action against the State of South Carolina. In *South Carolina* v. *United States*, 199 U. S. 437, it was held that a tax upon the agents of the State who were dispensing the

liquor under the dispensary laws, was not a tax against the State within the constitutional prohibition forbidding the federal government's taxing a State governmental function. The necessary inference from this latter case is that, although South Carolina, for procedural purposes, was a necessary party to any such litigation, within the meaning of the 11th Amendment, it was not exercising a governmental function within the meaning of the Constitution. Applying this analogy to the case at bar, it may be said that Oklahoma is a necessary party plaintiff upon the relation of the bank commissioner, but that because she is not the beneficial owner of the asserted cause of action and is not entitled to the proceeds thereof, if any, she is not asserting a cause of action in her governmental or sovereign capacity and therefore stands without status as "a party" within the meaning of Article III, Section 2 of the Constitution.

This is an ordinary lawsuit in which the parties are entitled to a jury trial. If Oklahoma were deemed "a party" in this case, within the meaning of the second paragraph of Article III, Section 2 of the Constitution, the effect would be to convert this court into a *nisi prius* court for jury trials of every controversy involving the liquidation of insolvent state banks, insurance companies, building and loan associations, and similar institutions, in which minor officials of a state see fit to invoke the jurisdiction. The facility of bringing individual defendants from all over the nation to the bar of this court to defend such cases obviously would invite petty officials of states to invoke such jurisdiction, were it declared to exist.

February 28, 1938, in *Helvering* v. *Therrell,* and companion cases (Nos. 128, 129, 287 and 597) it was said by this court: "* * * the inferred exemption from federal taxation does not extend to every instrumentality which a state may see fit to employ. Exemption depends upon the nature of the undertaking; it is cabined by the reason which underlies the inference."

By the same process of reasoning it should be ruled, if it has not been heretofore squarely decided—to paraphrase the language of the cases last above cited—that the original jurisdiction of this court does not extend to every case which a State may undertake to file here, nor to cases in which she seeks to recover money for the benefit of individuals and in which she has no interest whatever in her essential governmental capacity. Original jurisdiction depends upon the nature of the asserted cause of action; it is cabined by the reason which underlies the constitutional provision in question. The underlying reason was to provide a forum for an action by a State in her sovereign capacity, such as for redress of injury to her settlement of boundary disputes, water rights as between states, and the like. It was never contemplated or intended that this court should be made a *nisi prius* forum for trial of controversies such as arise out of liquidation of insolvent banks by a bank commissioner or liquidating agent or other official acting in the name of the State but for the benefit of others. The very absence of precedent for such a suit as plaintiff seeks to bring here, strongly indicates the lack of right so to do.

Wherefore, defendant prays the court to deny plaintiff's motion for leave to file Complaint.

Respectfully submitted,

R. B. CALDWELL,
LYNN WEBB,
JOHN W. OLIVER,
Attorneys for Defendant.

BLATCHFORD DOWNING,
Of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. —— Original.

THE STATE OF OKLAHOMA, UPON THE RELATION OF HOWARD C. JOHNSON, BANK COMMISSIONER, *Plaintiff*.

v.

R. M. COOK, *Defendant*.

PLAINTIFF'S REPLY TO ANSWER TO RULE TO SHOW CAUSE.

FRANCIS C. BROWN,
HOUSTON E. HILL,
Attorneys for the State of Oklahoma upon the Relation of Howard C. Johnson, Bank Commissioner, Plaintiff.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

R. M. COOK, *Defendant*.

PLAINTIFF'S REPLY TO ANSWER TO RULE TO SHOW CAUSE.

JURISDICTION.

The State of Oklahoma has asked leave to file this original action against a citizen of another State, under Article III, Section 2, Clause 1 of the Constitution and, Section 233 of the Judicial Code. (U. S. C. A. Title 28, Section 341.)

QUESTION PRESENTED.

The question raised is whether the State of Oklahoma is a real party in interest or only a nominal party.

Defendant admits that the State of Oklahoma is a *necessary* party plaintiff but contends that as she is not the beneficial owner of the claim, she has no standing to proceed. (Answer to Rule, page 9.)

ARGUMENT.

The Provisions of the State Law.

The Statute of Oklahoma under which the right arises also charges the State exclusively with its enforcement. It must be enforced by the State on the relation of the Bank Commissioner. The creditors of the failed bank cannot sue to enforce the claim. It is enforceable by the State alone:

> Section 9173, Oklahoma Statutes 1931 (page 10, plaintiff's complaint)
> *State ex rel Mothershead* v. *Kelly,* 141 Okla. 36, 284 Pac. 65;
> *State* v. *Quigley,* 93 Okla. 296, 220 Pac. 918;

Shareholders liability in Oklahoma constitutes, in effect, a reserve or trust fund, to be resorted to only in proceedings in liquidation, and the benefits go to all creditors collectively, not separately.

> *State ex rel Mothershead* v. *Kelly, supra.*

In *State ex rel Murray* v. *Pure Oil Co.,* 169 Okla. 507, 37 Pac. (2d) 608, the Supreme Court of Oklahoma defined the nature of the State's interest in the liquidation of insolvent banks as follows:

> "The protection of depositors of insolvent state bank is a distinct economic policy of the State. *State ex rel Short, Atty. Gen.* v. *Johnson et al,* 90 Okla. 21, 215 Pac. 945. This policy was promulgated by constitutional provision (section 1, Art. 14, Okla. State Const.) as vitalized by legislative enactments (Article 4 (Section 9147 et seq.) and Article 6 (Section 9168 et seq.) of Chapter 40, O. S. 1931. In so far as the object of this action is to further the established economic policy of the State, the State may be said to have a real interest created by its governmental policy, as distinguished from a mere nominal interest, even though the pecuniary benefits of the litigation, if ultimately successful, go to the depositors and creditors of the insolvent bank."

In liquidating an insolvent bank, the State is acting in its sovereign capacity. Thus, the Oklahoma Supreme Court has held repeatedly that the statute of Limitations does not run against the enforcement of the obligations of an insolvent bank in the hands of the State, as the statute does not run against the State:

Richison v. *State ex rel Barnett,* 176 Okla. 537, 56 Pac. (2d) 840;
State ex rel Shull v. *McLaughlin,* 159 Okla. 4, 12 Pac. (2d) 1106;
State ex rel Freeling v. *Ware,* 82 Okla. 130, 198 Pac. 859.

The state is the legal owner of the claim sued on.

Section 9179, Oklahoma Statutes, 1931, which provides in part as follows:

"* * *. The State of Oklahoma, on the relation of the Bank Commissioner, shall be deemed to be the owner of all the assets of failed banks in his hands, for the use and benefit of the depositors and creditors of said bank, and no deposit for costs shall be required in any court of the State of Oklahoma in which the State of Oklahoma, on the relation of the Bank Commissioner, is a party, and no costs shall be taxed against the State of Oklahoma, and paid by the State of Oklahoma, on the relation of the Bank Commissioner, in any such suits, and it shall be the duty of all the courts of the State of Oklahoma, and all the officers of the State or County, to give preference to all matters pending in such courts in which the State of Oklahoma, on the relation of the State Bank Commissioner, is a party."

This court held in *Lankford* v. *Platte Iron Works Company,* 235 U. S. 461, that an action against the members of the State Banking Board of Oklahoma, charged with administering its Bank Depositors' Guaranty Fund, was an action against the State and could not be maintained in the Federal courts under the 11th Amendment without the consent of the State. The Oklahoma Supreme Court has held that the repeal of the Guaranty Fund Act did not

change the State's relation to the liquidation of insolvent State banks. *Richison* v. *State ex rel. Barnett, supra.*

In the enforcing of the claim in suit, the State is discharging a duty expressly imposed upon it by statute. Section 9174 Oklahoma Statutes 1931 provides in part:

> " * * * The Commissioner *shall collect* all debts due and claims belonging to it and, upon the order of the District Court of the County in which it is doing business may sell or compound all bad or doubtful debts and, on like order, may sell all its real and personal property on such terms and at public or private sale, as the Court shall direct and *shall enforce* the liabilities of stockholders of such bank. (Italics added.) The stockholders' liability of such bank shall become due and payable upon the date of the taking possession of the property of any such bank by the Bank Commissioner, and the order of the Bank Commissioner finding the bank to be insolvent shall be conclusive evidence of that fact and the liability of said stockholders shall bear interest at the rate of six (6%) per cent per annum, from the date of the taking possession of the property of such bank by the Bank Commissioner."

We consider that the foregoing Oklahoma Statutes and decisions establish the following points:

(1) The State has the *legal title* to the claim in suit and is a *necessary party plaintiff;*
(2) An action to enforce the claim could not be instituted by any other plaintiff; and
(3) In enforcing collection of stockholders' liability claims, the State is performing its *express legal duty* as statutory receiver or trustee for the creditors of the failed bank.

The Construction of Article III, Section 2 of the Constitution.

The test for determining whether Federal jurisdiction exists under Article III, Section 2 of the Constitution is the same in cases where a State is a party plaintiff as in cases where the United States is a party. In both classes of cases, the question is whether the State or United States is a mere *nominal party* or has a real interest in the controversy. On this premise, we believe that jurisdiction in this case is squarely established under the principles laid down by this Court in

> *United States* v. *Minnesota,* 270 U. S. 181;
> *United States Fidelity & Guaranty Company* v. *United States suing for the benefit of Kenyon,* 204 U. S. 349.

United States v. *Minnesota,* presented the question of whether the Court had jurisdiction of an original bill by the United States to obtain lands to which it was alleged the Chippewa Indians were entitled and which Minnesota claimed under illegal patents. The court conceded that "if the Indians are the real parties in interest and the United States only a nominal party" original jurisdiction did not exist. The bill showed that the Indians were under the guardianship of the United States, that the patents were issued without authority and in violation of an existing obligation of the United States to apply the lands and the proceeds of their sale exclusively to the use and benefit of the Indians. The prayer declared that the lands and moneys recovered would be held, administered and disposed of for the benefit of the Indians. The Court assumed jurisdiction, stating:

> " * * * the United States has a real and direct interest in the matter presented for examination and adjudication. Its interest arises out of its guardianship over the Indians and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the

> fulfillment of its obligations; and in both aspects the interest is one which is vested in it as a sovereign."
> * * * "Neither does the fact that they (*i. e. the Indians*) could not sue the state show that the United States is without right to sue her for their benefit. *But it does make for and emphasize the duty, and therefore the right, of the United States to sue.*" (Italics added.)

In *United States Fidelity & Guaranty Company* v. *United States, suing for the benefit of Kenyon, supra,* was an action on a bond furnished under an Act of Congress to protect persons furnishing labor or materials to any contractor constructing public works for the United States. The action was brought against the contractor's surety by the United States "suing herein for the benefit and in behalf of James S. Kenyon" for the value of materials furnished by Kenyon to the contractor for use in the construction of a government building. The statute prescribing the bond, authorized any person protected "to bring suit in the name of the United States for his or their use and benefit." Jurisdiction depended on whether the United States was the real party litigant.

In upholding the jurisdiction of the Circuit Court, this Court stated:

> "* * * Congress may have deemed it important to assure those who furnish such materials and supplies that the government would exert its power directly for their protection. It may well have thought that the government was under some obligation to guard the interests of those whose labor and materials would go into a public building. * * * There is, therefore, a controversy here between the United States and the contractor in respect of that matter."
> "The action is none the less by the government as a litigant party, because only one of the persons who supplied labor or materials will get the benefit of the judgment."

The defendant herein relies on the cases of *New Hampshire* v. *Louisiana,* 108 U. S. 76, *North Dakota* v. *Minnesota,*

263 U. S. 365, and *Louisiana* v. *Texas*, 176 U. S. 1, as supporting its point that jurisdiction does not exist. These cases all involved original bills by states against other states and therefore turned upon the question of immunity of the defending states from suit in the Federal courts under the 11th Amendment. The question in the first two of these cases was not the right of the plaintiff state to sue but the right of the defending state to be immune from suit unless the party beneficially interested was another state. The inquiry in each instance was to determine whether the plaintiff state was lending its sovereign name to one or more private persons as a cloak of legal subterfuge to bring to the bar another sovereign who otherwise would be immune from suit, except in its own courts, as it might gratuitously permit. There is sound reason for scrutinizing the nature of the complaining states' claim in such cases, for it involves the very delicate question of sovereign immunity. But these cases are inapplicable to the case at bar where the state in pursuance of a well established policy, common to more than half of the states of the Union, by express statutory provision assumes the duty of liquidating failed banks for the benefit of the creditors involved.

Thus, in *North Dakota* v. *Minnesota* this Court said:

> "The jurisdiction and procedure of this court in controversies between states of the Union differ from those which it pursues in suits between private parties" * * *.
>
> "The right of a state as *parens patriae* to bring suit to protect the general comfort, health or property rights of its inhabitants, threatened by the proposed or continued action of another state, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee *against a sister State*". (Italics added.)

In *New Hampshire* v. *Louisiana*, the Court said:

> "We are satisfied that we are *prohibited*, both by the letter and the spirit of the Constitution, (*i. e. the 11th*

Amendment) from entertaining these suits." (Italics added.)

In *Louisiana* v. *Texas,* the Court raised but did not decide the question of its jurisdiction *as against the State of Texas,* that the injury complained of was to a group of citizens of Louisiana, residents of New Orleans, rather than the State itself. The case against Texas failed because the bill did not show "that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own." The opinion dealt separately with the case against the individual defendant, the Texas health officer, holding that no case was made against him, as the remedy for any acts of official maladministration rested with the Texas authorities "and no refusal to fulfill their duty in that regard is set up." The necessary conclusion is that the fact that Louisiana was acting for a group of its citizens did not bar jurisdiction as against the individual defendant, a citizen of another State.

Cases dealing with suits between states have no bearing on the controversy in this case. Where a state as the representative of individuals sues a sister state, the nature of the interest of the former in the controversy is inquired into only because upon this hinges the right of the defending state to immunity. While a state as a representative of private individuals may not sue a sister state in Federal courts, *non constat* that jurisdiction does not lie in a similar action against an individual defendant who does not enjoy such immunity, provided the suing state has sufficient interest in the subject matter to enable it to state a cause of action. Obviously the suing state must be something more than a pure volunteer. It must have an interest in the subject matter as *parens patriae,* as in the case of *Georgia* v. *Tennessee Copper Company,* 206 U. S. 230, or a property right of a legal or equitable nature, as in the cases of *United States* v. *Minnesota,* 270 U. S. 181 and *South Dakota* v. *North Carolina,* 192 U. S. 286, which it is

entitled to call upon the courts to preserve or enforce, as otherwise no cause of action would be stated. Where a state has a property right fixed by *express statutory provision* other than a subterfuge for circumventing the 11th Amendment as was the case in *New Hampshire* v. *Louisiana,* 107 U. S. 76, we do not see how it can logically be contended that the state may not invoke the jurisdiction of the Federal courts to enforce its claims against an individual defendant, who is a citizen of a sister state, although private individuals may subsequently receive the principal benefits of the recovery. In the case at bar, the state's interest is direct and immediate, whereas the interest of the depositors is wholly indirect and dependent upon a distribution of the fund in the hands of the Bank Commissioner after the payment of all administration expenses, taxes and other prior claims. The state is vested with the legal title to the claim and is under the express duty of enforcing it.

Oklahoma v. *Atchison T. & S. F. R. Co.,* 220 U. S. 277, cited by defendant, presents a case where the state had no legal or equitable interest affected and its citizens in whose behalf it sued, could themselves have obtained relief in their own names had any cause of action existed. However, the discussion of the nature of the state's interest is not only dictum but hypothetical as well, and the decision rests on the fact the provisions in the act of Congress relied upon had ceased to be operative when Oklahoma became a state and was no longer a territory.

Original jurisdiction depends upon the character of the parties. It does not depend on the nature of the cause of action, as defendant contends. "The character of the parties is everything, the nature of the case nothing." *Cohens* v. *Virginia,* 6 Wheat. 264, 5 L. ed. 257. Nor as defendant states, is it limited to cases for redress of the sovereign rights of states, such as boundary disputes, water rights and the like. "Jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their

inhabitants and in cases *directly affecting the property rights and interests of a state.* But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and, indeed, impossible for the Court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this Court". *Missouri* v. *Illinois,* 180 U. S. 208, 241.

The Court has jurisdiction of an original action by a state to "enforce a property right."

South Dakota v. *North Carolina,* 192 U. S. 286.

Nor will it be necessary, as defendant apprehends, to convert this Court into a *nisi prius* court for a jury trial of the issues involved. This is a matter of academic concern, for there are no controvertible issues of fact in the case, the determination of the Bank Commissioner being conclusive of all essential matters.

Section 9174 Oklahoma Statutes 1931.
Thompson v. *State ex rel Bank Commissioner,* 119 Okla. 166, 248 Pac. 1110;
State ex rel Mothershead v. *Kelly,* 141 Okla. 36, 284 Pac. 65;
Broderick, Supt. of Banks v. *Rosner,* 294 U. S. 629.

That it is not the purpose of the State of Oklahoma generally to enforce by original action in this Court claims of this character, is evidenced by the fact that it has endeavored first to obtain relief elsewhere. It has come to this Court at this time because at the defendant's insistence the United States District Court ruled, we believe properly, that the State of Oklahoma was the real party in interest and hence that jurisdiction did not lie in that court and because, as set forth on page 2 of plaintiff's motion for leave to file complaint, the Missouri state court required a degree of proof with respect to the insolvency of the bank and

the necessity for the enforcement of shareholder's liability which was virtually impossible of production, and refused to attach any probative effect to the Commissioner's determination of these matters, notwithstanding the authorities quoted above.

Because this is an action in which the state has a direct present property interest and a statutory duty to perform we believe that this Court unquestionably has jurisdiction. We find no case in which jurisdiction has been denied under these circumstances.

CONCLUSION.

The State of Oklahoma submits that its motion for leave to file the complaint should be granted.

Respectfully submitted,

FRANCIS C. BROWN,
HOUSTON E. HILL,
Attorneys for the State of Oklahoma upon the Relation of Howard C. Johnson, Bank Commissioner, Plaintiff.

Supreme Court of the United States

OCTOBER TERM, 1937.

No. ..... Original.

THE STATE OF OKLAHOMA, UPON THE RELATION OF HOWARD C. JOHNSON, BANK COMMISSIONER, PLAINTIFF,

VS.

R. M. COOK, DEFENDANT.

REPLY AND SUPPLEMENTAL BRIEF OF DEFENDANT, R. M. COOK, ON RULE TO SHOW CAUSE.

R. B. Caldwell,
Blatchford Downing,
Lynn Webb,
John W. Oliver,
2000 Fidelity Bldg.,
Kansas City, Missouri,
Attorneys for Defendant.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. ..... Original.

THE STATE OF OKLAHOMA, UPON THE RELATION OF HOWARD C. JOHNSON, BANK COMMISSIONER, PLAINTIFF,

VS.

R. M. COOK, DEFENDANT.

REPLY AND SUPPLEMENTAL BRIEF OF DEFENDANT, R. M. COOK, ON RULE TO SHOW CAUSE.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

In view of "Plaintiff's Reply to Answer to Rule to Show Cause" filed herein by the attorneys for the plaintiff, defendant believes it advisable to file this both as a reply brief thereto, and also as a supplement to the somewhat limited legal discussion contained in defendant's "Answer to Rule to Show Cause."

Plaintiff's two-fold capacity relied upon to sustain jurisdiction.

In invoking the original jurisdiction of the Supreme Court of the United States, plaintiff, the State of Oklahoma, upon the relation of Howard C. Johnson, its bank commissioner, relied upon the legal title to the cause of action as being vested in the state pursuant to the provisions of its own laws. Defendant, in his "Answer to Rule to Show Cause" pointed out that the State's ownership was that of a bare trustee vested with legal title, but that the beneficial ownership of the cause of action and of any possible proceeds of recovery thereon belonged exclusively to private interests, namely, the depositors and other creditors of the Osage Bank of Fairfax, Oklahoma; that under no possible circumstances can a single penny of the proceeds of any recovery herein go to or vest beneficially in the State. In short, that the State itself has no property interest involved herein, and there is accordingly no real controversy between the State as such and defendant, a citizen of Missouri.

To meet this contention, plaintiff, in its reply to the answer to the rule to show cause urges the proposition that the State has elected itself to protect the rights and interests of bank depositors as a sovereign governmental function of the State, as a matter of public policy. It accordingly invokes the jurisdiction of this Court in aid of the enforcement of that policy and as an aid to the exercise of this self-assumed function exercised as an attribute of sovereignty. We respectfully submit that this second aspect of the capacity in which plaintiff

sues adds nothing to its right to invoke the original jurisdiction of this Honorable Court.

I.

There must be a true and substantial controversy between the plaintiff State and the defendant citizen of another state, in which the plaintiff State is itself directly interested.

It has been repeatedly ruled by this Court that the requirements of Clause 1 of Section 2 of Article III of the Constitution of the United States are fundamental and paramount to the provisions of Clause 2 of the same section. Clause 1 extends the federal judicial power "to controversies * * * between a state and a citizen of another state * * *." Clause 2 merely distributes or divides the jurisdiction of the Supreme Court as between original and appellate jurisdiction; it does not confer jurisdiction. There must be, in truth and in fact, a real and substantial controversy between a state and a citizen of another state before the case is one for the original jurisdiction of this Court, even though a state be a proper or even a necessary party thereto. *Louisiana* v. *Texas,* 176 U. S. 1, 16, 44 L. Ed. 347, 353; *Minnesota* v. *Hitchcox,* 185 U. S. 383, 46 L. Ed. 954; *United States* v. *Texas,* 143 U. S. 643, 36 L. Ed. 285; *United States* v. *West Virginia,* 295 U. S. 463, 79 L. Ed. 1546.

II.

The State of Oklahoma has no direct property interest in the subject matter of the controversy.

In our original "Answer to Rule to Show Cause," pages 5-6, we pointed out that all proceeds of the enforcement of a bank stockholder's liability such as that involved herein are to be applied to payment of depositors and creditors of the bank, and that if any excess remains, they shall revert to the stockholders of the bank, Section 9173, Oklahoma Statutes, 1931. The statutory stockholder's liabilities are "designed solely for the benefit of creditors and to constitute a fund available only when the bank is insolvent, and thus unable to meet its liabilities in full * * * it amounts for all practical purposes to a reserve or trust fund * * *" *State ex rel. Mothersead, Bank Com'r,* v. *Kelly,* 141 Okla. 36, 284 Pac. 65; *American Exchange Bank of Henryetta* v. *Rowsey,* 144 Okla. 172, 289 Pac. 726; *Griffin* v. *Brewer,* 167 Okla. 654, 56 Pac. (2d) 840.

The assets of insolvent banking institutions are liquidated "for the benefit of certain members of the public who were depositors in such institutions." *Richison, Adm'x,* v. *State ex rel. Barnett, Bank Com'r,* 176 Okla. 537, 56 Pac. (2d) 840.

In *Helvering* v. *Therrill,* 82 L. Ed. Adv. Op. 537, 541, involving the liability of a state bank liquidator to federal income tax, this Court said:

> "The compensation of the taxpayers was paid from corporate assets—not from funds belonging to the State. No one of them was an officer of the

State in the strict sense of that term. The business about which they were employed was not one utilized by the State in the discharge of her essential governmental duties. The corporations in liquidation were private enterprises; their funds were the property of private individuals."

True, the bank commissioner as the designated executive officer of the State to enforce the stockholder's liability, is vested with authority greater than that of an ordinary chancery receiver (*Converse* v. *Hamilton*, 224 U. S. 243, 56 L. Ed. 749) and hence can bring suit in the name of the State in the courts of other jurisdictions to enforce the transitory property right originating in the contract of becoming a stockholder. Viewed in the aspect of collecting or enforcing the property rights of the depositors and creditors of the defunct bank, as stated in *Converse* v. *Hamilton*, "The case presented was, in substance, that of a trustee clothed with adequate title for the occasion, seeking to enforce for the benefit of his *cestui que trustent* a right of action transitory in character against one who was liable contractually and severally if at all."

But the mere clothing of the State with the legal title as trustee of a cause of action or its proceeds, is not sufficient to constitute a real and substantial *controversy* directly between the State and the defendant citizen of Missouri.

In the leading cases of *New Hampshire* v. *Louisiana*, and *New York* v. *Louisiana*, 108 U. S. 76, 27 L. Ed. 656, the plaintiff states, respectively, had, pursuant to

enactments of their legislatures, been vested with complete legal title to the bonds of the State of Louisiana, but this ownership was that merely of a trustee for the benefit of private individuals who had previously owned them. This Court declined to take original jurisdiction of the controversy. Counsel for plaintiff herein assert, however, that the refusal by this Court to take original jurisdiction was based on the ground that the defendant, State of Louisiana, was a sovereign state which could not be sued without its consent, and that the capacity in which the plaintiff states, New Hampshire and New York, held the bonds was not involved.

On the contrary, this question of capacity in which the plaintiff states held the bonds, was the essential question upon which the result turned. Prior to the adoption of the Eleventh Amendment to the Constitution, under the decision in *Chisholm* v. *Georgia*, 2 Dall. 419, it was ruled that citizens of another state could sue a state of the Union as defendant in the Supreme Court of the United States. The Eleventh Amendment, remedying this situation, declared that the judicial power of the United States should not extend to suits brought *by citizens* of another state against one of the United States. It left untouched the jurisdiction of this Court over controversies between states, *i. e.*, when both plaintiff and defendant were states of the Union. Accordingly, if the controversies between New Hampshire and New York on the one hand and Louisiana on the other, were truly controversies between states, the jurisdiction would have been sus-

tained under Section 2 of Article III of the Constitution, and not prohibited by the Eleventh Amendment. The Court held, however, that, in truth and in fact, since the plaintiff states were merely trustees clothed with the legal title to the bonds for the benefit of their individual citizens, the cases filed did not present controversies truly between states and jurisdiction was denied. The Court thus stated the question:

> "The real question, therefore, is, whether they can sue in the name of their respective states after getting the consent of the state, or, to put it in another way, whether a state can allow the use of its name in such a suit for the benefit of one of its citizens."

The Court then referred to the contention similar to that made herein, that the plaintiff states, as sovereigns and trustees of their citizens had the right to represent them somewhat in the nature of *parens patriae*, the Court saying:

> "It is contended, however, that, notwithstanding the prohibition of the amendment, the states may prosecute the suits, because, as the sovereign and trustee of its citizens, a state is 'Clothed with the right and faculty of making an imperative demand upon another independent state for the payment of debts which it owes to citizens of the former.'"

The Court rejected the contention, pointing out that a cause of action attempted to be asserted by a state for the sole beneficial use of the citizens in respect to their property rights was not the type of controversy between

states contemplated under Section 2 of Article III of the Constitution, and the Court concluded with the following significant language:

> "* * * and, in our opinion, one state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other state to its citizens."

If, as the above quotation declares, a state cannot create a controversy between itself and another state within the meaning of the jurisdictional clauses of the Constitution by assuming the prosecution of debts owing by the other state to its citizens, no more can it create a controversy between itself and the citizen of another state by assuming the prosecution of debts owing in truth and in fact to the citizens of the plaintiff State rather than to the State itself.

While the State of Oklahoma is fully empowered to assume by trusteeship the legal title and right to prosecute claims of its citizens, if they see fit to grant it that power, that State cannot by so doing enlarge the constitutionally prescribed jurisdiction of the Supreme Court of the United States. It cannot convert by its own mere legislative enactments what is, in truth and in fact, a claim or cause of action for the benefit solely of its citizens into a controversy with the State itself within the meaning of that phrase as contemplated by the framers of the Constitution.

That the cases of *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana* did, in fact, turn upon the ques-

tion of where the beneficial ownership of the bonds lay, as between the plaintiff States and their citizens, is made clear from the ruling of the court in *South Dakota* v. *North Carolina*, 192 U. S. 286, 48 L. Ed. 448. In that case, in contrast with the New Hampshire and New York cases, the holders of certain bonds issued by Louisiana donated them outright to the State of South Dakota. In such a situation, this Court sustained its original jurisdiction and distinguished the New Hampshire and New York cases, saying:

> "Neither can there be any question respecting the title of South Dakota to these bonds. They are not held by the state as representative of individual owners, as in the case of *New Hampshire* v. *Louisiana*, 108 U. S. 76, 27 L. Ed. 656, 2 Sup. Ct. Rep. 176, for they were given outright and absolutely to the state."

It results from these two contrasting decisions that the controversy or cause of action which the plaintiff State is asserting when a state is plaintiff and a citizen of another state is defendant, must be one involving a beneficial property right of the plaintiff State. The state must be vested with the beneficial as well as the legal ownership for the controversy to be one truly between the State and the defendant. Such beneficial ownership of a property interest is entirely lacking in the case at bar.

Of the case of *New Hampshire* v. *Louisiana*, Mr. Justice Harlan in his separate concurring opinion in *Louisiana* v. *Texas*, 176 U. S. 1, l. c. 25, 44 L. Ed. 347, l. c. 357, said:

> "The citizens of the complaining state may, in proper cases, invoke judicial protection of their property rights when assailed by the laws and authorities of another state; but their state cannot, even with their consent, make their case its case and compel the offending state and its authorities to appear as defendants in an action brought in this court. If this be not so, we were wrong in *New Hampshire* v. *Louisiana*, 108 U. S. 76, 27 L. Ed. 656, 2 Sup. Ct. Rep. 176, in which case it was held that one state could not, by taking charge of demands or debts held by its citizens, against another state, acquire the right to bring a suit in its name in this court against the debtor state."

And Mr. Justice Brown in his separate concurring opinion said:

> "* * * and while I fully agree that resort cannot be had to this court to vindicate the rights of individual citizens, or any particular number of individuals * * *."

The function of the State relied upon in seeking to enforce the liability involved herein is described as "its lost power" in *North Dakota* v. *Minnesota*, 263 U. S. 365, 68 L. Ed. 342, where the court said, l. c. 375-376:

> "* * * The right of a state as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants, threatened by the proposed or continued action of another state, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state."

If as demonstrated in *New Hampshire* v. *Louisiana,* and *New York* v. *Louisiana, supra,* the states have by the Eleventh Amendment lost their power to enforce individual claims of their citizens against sister states, because the controversy is not truly one in which the plaintiff State is directly involved, by the same reasoning they never had the right to invoke the original jurisdiction of this Court to enforce such claims since they are likewise not truly or directly involved therein.

III.

The interest of the State of Oklahoma in enforcing in its sovereign governmental capacity its public policy with reference to protection of depositors and creditors of banks is not such an interest as sustains original jurisdiction in the Supreme Court.

In order to escape the barrier to original jurisdiction in the Supreme Court, consisting of lack of beneficial property interest in the controversy, as above demonstrated, counsel for the State of Oklahoma seek to bolster up their claim of jurisdiction by asserting that the State of Oklahoma has a real interest in the controversy separate and distinct from that of the individual depositors and creditors of the bank in that it is a part of its public policy, and, in fact, one of its sovereign functions to protect depositors in banks and creditors thereof from loss. They undertake to demonstrate that the State is exercising an attribute of sovereignty in so doing and they would supply the lack of property interest by invoking a governmental interest. Unfortunately, the stronger they urge and the more successfully they

demonstrate this aspect of the controversy, the more conclusively do they state themselves out of Court on the jurisdictional question.

In *Pennsylvania* v. *The Wheeling, &c., Bridge Co.*, 13 How. 559, 14 L. Ed. 249, the State of Pennsylvania successfully maintained original proceedings in this Court to enjoin the bridge company from maintaining a bridge across the Ohio River, which interfered with the operation of lines of canal boats and railroads constructed and owned by the State. The original jurisdiction of the Court was challenged by counsel for the defendant on the ground among others that the bill of complaint did not show "a direct and immediate interest in the State of Pennsylvania, in her corporate capacity" (14 How. l. c. 545); and as stated by the Court (14 How. l. c. 558) "that the State of Pennsylvania had no corporate capacity to institute this suit in the Supreme Court, to vindicate the rights of her citizens."

In answer to these objections the Court relied on the State's direct property interest in the canal boats and railroads and the tolls therefrom and said:

> "In this case the State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. The sovereign powers of a state are adequate to the protection of its own citizens, and no other jurisdiction can be exercised over them, or in their behalf, except in a few specified cases. Nor can the state prosecute this suit on the ground of any remote or contingent interest in itself. It assumes and claims, not an

> abstract right, but a direct interest in the controversy, and that the power of this court can redress its wrongs and save it from irreparable injury. If such a case be made out, the jurisdiction may be sustained."

This assertion of state governmental policy is merely a statement of the motive behind the legislative enactment. Presumably all state enactments are in furtherance of the public policies of the State, both economic and political, but that does not convert a property interest merely of individuals governed or regulated by the enactment into a direct property interest of the State, or one capable of judicial enforcement in the courts of another jurisdiction.

The Supreme Court of Oklahoma has itself expressly stated that this right to enforce stockholders' liability is merely a property right belonging to the creditors of the bank. In *Thompson* v. *State ex rel. Bank Commissioner,* 119 Okla. 166, 248 Pac. 1110, the Court said, referring to its earlier decision in *Blackert* v. *Langford, Commissioner,* 74 Okla. 61, 176 Pac. 532:

> "There it was held that the stockholders' liability is designed solely for the benefit of the creditors and constitutes a fund available only when the bank is insolvent and unable to meet its obligations in full."

The Court earlier referred to the matter thus:

> "* * * the stockholders' double liability, which, as said in *Delano* v. *Butler,* 118 U. S. 634, 'is limited to an amount equal to the par value of

the stock held and owned by each stockholder, and exists in favor of the creditors collectively, not severally, and in proportion to the amount of their respective claims against the corporation.'"

The right herein sought to be asserted is essentially a pure property right of the creditors of the bank, and it does not change its nature to assert that it was created pursuant to the exercise of the sovereign power of the State to enact the provision, or that it was part of the State's public policy to enforce it.

However, even if it were true that the State has itself assumed an interest in the collection of these claims in some manner distinct from its general political interest in seeing that all its civil as well as its criminal laws are obeyed, it does not result that such interest of the State, assuming it to exist, is one that can be asserted and enforced extraterritorially in the courts of another jurisdiction, be they those of a sister state, or by original proceedings in the Supreme Court of the United States.

Viewed in the aspect of seeking to enforce this public policy, apart from any property interest in the State, the State may be exercising an attribute of sovereignty, but it is fundamental that the exercise of such attributes is and must be confined to the territorial jurisdiction of the sovereign seeking to exercise it. The same principles which deny the right of a state to invoke the jurisdiction of a sister state or the original jurisdiction of the Supreme Court of the United States to enforce its penal laws or other exercises of its police

power, operate to deny it the right to invoke the jurisdiction of other sovereignties to enforce or give effect to this public policy upon which counsel for the State so strongly rely. The case is no different from any other attempt to enforce extraterritorially the State's local, municipal law or police power.

In *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 286, 32 L. Ed. 239, the plaintiff State had obtained a judgment in one of her own courts against the defendant insurance company for the enforcement of a penalty for violation of the State's insurance laws. She, thereupon, sued upon this judgment by original proceeding in the Supreme Court. The Court, in an opinion by Mr. Justice Gray, reviewed exhaustively the previous decisions of the Court and the principles involved in the jurisdictional question and concluded that the jurisdiction did not lie. The Court said, among other things:

> "The grant is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other state at all."

This case of *Wisconsin* v. *Pelican Insurance Co.*, is a much stronger case for the plaintiff than is the case at bar, for the reason that Wisconsin, having reduced her claim to the fine or penalty to a money judgment in her own courts, was vested with a property interest in the cause of action. Nevertheless, the Supreme Court,

relying upon the fundamental principle that the courts of one jurisdiction will not enforce the penal laws or municipal legislation of another state, refused jurisdiction, saying:

> "In whatever form the State pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offense.
>
> "The court, therefore, cannot entertain an original action to compel the defendant to pay to the State of Wisconsin a sum of money in satisfaction of the judgment for that fine."

Huntington v. *Attrill*, 146 U. S. 657, 36 L. Ed. 1123, is in no way in conflict with the foregoing proposition. In that case the Supreme Court held it was error for the Court of Appeals of the State of Maryland to refuse to enforce a judgment obtained in the State of New York upon defendant's liability as a director of a New York corporation for having signed a false certificate in violation of a provision of the New York Corporation Law. The judgment was obtained not by the State in original proceedings in the Supreme Court but by an individual in a state court. The character of the liability was held to be remedial for the benefit of creditors of the corporation, and not a penal enactment of the State. In fact the decision sustains our contention that the interest which the plaintiff is seeking to enforce herein is not in fact one in which the State has any direct interest, but is

purely for the benefit of the property interests of its individual citizens.

The State of Oklahoma may adopt and enforce, subject to Federal Constitutional limitations, whatever public policies it sees fit, and enforce them by whatever means and methods she, as a sovereign state, may determine, but it is contrary to all principles of international law to permit her to invoke as of right the jurisdiction of the courts of any other sovereignty to enforce such governmental policies for her.

Squarely in point is the case of *State of Oklahoma* v. *Atchison, Topeka and Santa Fe Railway Company*, 220 U. S. 277, 55 L. Ed. 465. In this case the State of Oklahoma brought suit by original proceedings in this Court to enjoin the defendant railway from charging rates on domestic shipments greater than those authorized by the State of Kansas. The State claimed that the defendant was operating in violation of a congressional grant which provided that the inhabitants of the Territory of Louisiana should not be charged a greater freight rate than that authorized by the laws of the State of Kansas for similar service, and further alleged "that if the defendant was permitted further to operate the railroad in violation of the congressional grant, it would be a hindrance to the growth of the State as well as an injury to the property rights of the inhabitants." The Court rejected the case as not within its original jurisdiction. The Court first pointed out that the State of Oklahoma was not itself a shipper of the commodities the rates on which were involved, and had no property interest therein, saying:

> "But the state, as such, in its governmental capacity, is not engaged in their sale or transportation, and has no property interest in such commodities. It seeks only, as between the railway company and shippers, by a general, comprehensive decree to enforce certain rates, and to compel the railway company to respect the rights of *all* of the people of Oklahoma who may have occasion to ship such commodities over the railway."

The Court then answered the contention that the State, in its governmental capacity as being concerned with the welfare of its citizens generally might have a sufficient interest by saying:

> "These doctrines, we think, control this case, and require its dismissal as not being within the original jurisdiction of the court, as defined by the Constitution. Under a contrary view that jurisdiction could be invoked by a state, bringing an original suit in this court against foreign corporations and citizens of other states, whenever the state thought such corporations and citizens of other states, were acting in violation of its laws to the injury of its people generally or in the aggregate; although an injury in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of states, could be reached, without the intervention of the state, by suits instituted by the persons directly or immediately injured.
>
> "We are of opinion that the words in the Constitution conferring original jurisdiction on this court in a suit 'in which a state shall be a party' are not to be interpreted as conferring such jurisdiction in every cause in which the state elects to make itself strictly

> a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its own laws or public policy against wrongdoers generally."
>
> See, also, *Oklahoma* v. *Gulf, etc., Ry.*, 220 U. S. 290, 55 L. Ed. 469.

All the decisions dealing with this matter of stockholders' liability treat it as simply a contractual liability incurred by the act of becoming a stockholder in the corporation. The State itself has no such direct interest in seeing that contracts with its corporations are fulfilled as to constitute a breach of the contract if there be one, a controversy with the State itself within the meaning of Section 2 of Article III of the Constitution.

Counsel for plaintiff herein rely upon *United States* v. *Minnesota*, 270 U. S. 181, 70 L. Ed. 539. In that case the Court entertained jurisdiction of an original proceeding by the United States against the State of Minnesota to recover lands to which it was alleged the Chippewa Indians were entitled and which Minnesota claimed under illegal patents. The United States occupied the position of a guardian of the Indians, something more than the trusteeship which the State of Oklahoma has assumed for the benefit of its bank depositors and creditors. It was vested with the title before the cause of action arose. In the case at bar the State of Oklahoma had never been vested with the money it seeks to recover from defendant Cook. There was the added feature that the United States had incurred treaty obligations to apply the lands and the proceeds of their sale exclusively to the use, support and civilization of the

Indians, an obligation incurred before the issuance of patents to the State of Minnesota. It was contended that the suit was essentially one brought by the Indians against the State of Minnesota and that the United States was merely a nominal party as guardian for them. The Court stated that it must be conceded that if such were the case, it was not within the Court's original jurisdiction, citing *New Hampshire* v. *Louisiana,* and similar cases. But the Court pointed out that the United States not only was obligated as guardian of the Indians to recover property which had been wrongfully withdrawn from its guardianship, but was also under an obligation in the nature of a property or financial obligation similar to that of a guarantor to see that the lands or their proceeds were disposed of in accordance with the treaty obligations.

Furthermore Section 2 of Article III of the Constitution does not expressly require that there be a controversy *with* the United States, but only that it be a party thereto. In this it differs from the language relating to controversies *between* a state and a citizen of another state.

In contrast with this case is that of *Kansas* v. *United States,* 204 U. S. 331, 51 L. Ed. 510, wherein the Supreme Court declined to entertain original jurisdiction.

In *Lankford* v. *Platte Iron Works Co.,* 235 U. S. 461, 59 L. Ed. 316, relied on by counsel for plaintiff State herein, it was held that a District Court of the United States could not issue a mandatory injunction in the nature of mandamus to compel the State Banking Board

to pay a claim or issue a certificate of indebtedness against the Bank Guaranty Fund. It was held that such fund was created by and belonged to the State and its administrative control thereof could not be subjected to judicial control of the Court. In the case at bar there is no fund created by and belonging to the State. There is simply a contractual liability entered into with the defunct bank and sought to be enforced for the sole benefit of the creditors of the bank.

From the foregoing adjudications it is obvious that in order for a state to maintain an original proceeding in this court against a citizen of another state the plaintiff State must have a property interest in the controversy, *i. e.*, in the proceeds of the cause of action sought to be enforced. Its interest must be other than a political governmental interest or one involving only its local municipal law or public policy. And this property interest must be asserted in its own right as beneficial owner thereof and not that of a mere trustee for private beneficiaries.

Cases against a state as defendant whether brought by another state or by the United States depend upon other clauses of the Constitution and involve entirely different principles. Except for the Federal Constitution a state cannot be made a defendant at all without its consent. The Constitution abolished international diplomatic negotiations or resort to force in controversies against a state and substituted therefor judicial proceedings in the Supreme Court of the United States. A private individual or corporation on the other hand could always be sued in courts of the jurisdiction to which he or it was

subject. Resort to diplomatic negotiation or force was unnecessary and inappropriate. There was no need to provide for original jurisdiction in the Supreme Court of suits against such private defendants. Such original jurisdiction was in such cases provided only when the controversy was one in which the plaintiff State had a real direct property interest in its own right and one transient in character which it would be entitled to enforce extraterritorially in the courts of a sister state.

IV.

The consequences of sustaining original jurisdiction in this case make clear the fact that it is not such as was contemplated in the framing of the Constitution.

The consequences of a ruling that the instant case is one properly within the original jurisdiction of this Court are somewhat startling to contemplate. It may be true that if the jurisdiction is properly invoked under the Constitution, practical objections may not be of controlling weight, but the Court may well pause before permitting itself to be converted into a *nisi prius* court by the simple device of a state assuming as a governmental function the obligation to enforce collection of the assets of insolvent banks, including enforcement of stockholders' double liability. If this jurisdiction is sustained it is not limited merely to suits to enforce the liability of stockholders, but the State of Oklahoma at the relation of its bank commissioner and any other state which may see fit to adopt the same legislative device, would be entitled to resort to original proceedings in the Supreme Court to

enforce collection of every bill and note or other obligation constituting an asset of the estate. In effect this Honorable Court could be converted into a mere forum for the collection of all the multitudinous claims of which a bank liquidator customarily finds himself possessed. There is no limitation with respect to the amount involved to the exercise of this Court's jurisdiction under Article III, Section 2 of the Constitution in cases where a state is a party.

In *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 32 L. Ed. 239, Mr. Justice Gray concluded the Court's opinion with the following significant statement:

> "The original jurisdiction of this court is conferred by the Constitution, without limit of the amount in controversy, and Congress has never imposed (if indeed it could impose) any such limit. If this court has original jurisdiction of the present case, it must follow that any action upon a judgment obtained by a state in her own courts against a citizen of another state for the recovery of any sum of money, however small, by way of a fine for any offense, however petty, against her laws, could be brought in the first instance in the Supreme Court of the United States. That cannot have been the intention of the convention in framing, or of the people in adopting, the Federal Constitution."

Furthermore the contentions urged by plaintiff herein, if sound, are not limited to cases involved in the liquidation of the assets of defunct banks. The same

principles would apply to the liquidation of insurance companies and similar institutions of a character to make their functions a proper subject of state governmental regulation and control. All proceedings for the liquidation of and collection of the assets of insolvent banks and insurance companies throughout the United States could be lodged *en masse* in this forum by the simple device of the legislatures of the states passing enactments vesting title to such assets in the state and declaring it a part of its sovereign duty to enforce collection thereof.

The multitudinous defendants in such proceedings will be, as is the defendant Cook herein, entitled to trial by jury (Judicial Code, Sec. 235; 28 U. S. C. A., Sec. 343).

True, the impaneling of and trial by jury presents no insuperable obstacle to the exercise by this Court of its original jurisdiction if properly invoked. *Chisholm* v. *Georgia,* 2 Dall. 419. But jury trials of multitudinous claims involving, it may be, only a few dollars in each instance were, as Mr. Justice Gray pointed out in the Pelican Insurance Company case, hardly within the contemplation of the framers of the Constitution when they provided for the original jurisdiction of this Court to be restricted to the class of cases specified in Article III, Section 2 of the Constitution.

Furthermore, all of the statutory provisions restricting venue to judicial districts of the defendants' residence and the policy underlying such limitations of venue would be done away with. A liquidator of an insolvent

bank or life insurance company located in New York could in the name of that state hale a defendant residing, it might be, in California or Texas, before the bar of this Court to answer a demand of even less than $100.00, in which case the cost and expense of appearing would greatly exceed the sum involved.

While there have been thousands of suits maintained in the courts of the country to enforce the double liability of stockholders in banks and other corporations, and although the Supreme Court of the United States has reviewed many of them in the exercise of its appellate jurisdiction, this is the first instance in which it has ever been contended that suits of such character could be instituted by original proceeding in the Supreme Court. If such jurisdiction exists, it is indeed surprising that this Court has not been heretofore deluged with multitudinous cases of this sort. Had it been, undoubtedly remedial action would have been taken by the Congress or by amendment to the Constitution, if need be, to prevent the conversion of this Court into a *nisi prius* court by the flood of such litigation. The fact that no case remotely similar to the case at bar has ever been entertained as an original proceeding by this Court since its inception is some indication that it was never contemplated that the jurisdiction here sought obtains.

The plaintiff herein naturally and properly first invoked the jurisdiction of the Circuit Court of Jackson County, Missouri, and instituted suit therein on the cause of action here involved. That jurisdiction has always been open and available to the plaintiff subject to what-

ever defenses the defendant may have. The plaintiff voluntarily dismissed its proceedings in the Jackson County Circuit Court, not because of any jurisdictional obstacles, but solely because it found itself unable under the rulings of that Court to prove its case. Under the liberal Missouri practice in such a situation, the plaintiff may elect to proceed until there is a definite adverse ruling by the court which would prevent the plaintiff obtaining judgment, in which case the plaintiff can submit to an involuntary nonsuit and thereafter appeal from the court's ruling. *Bank* v. *Gray*, 146 Mo. 568; *McClure* v. *Campbell*, 148 Mo. 96. Or the plaintiff, before such ruling can, as it did in this instance, take a voluntary nonsuit or dismiss without prejudice and file a new suit at any time within the period of the statute of limitations. It elected to do neither. This situation involves none of the considerations calling for the exercise of this Court's original jurisdiction as contemplated in the Constitution.

Respectfully submitted,

R. B. CALDWELL,
BLATCHFORD DOWNING,
LYNN WEBB,
JOHN W. OLIVER,
2000 Fidelity Bldg.,
Kansas City, Missouri,
Attorneys for Defendant.

SUPREME COURT OF THE UNITED STATES.

— Original.—October Term, 1937.

The State of Oklahoma, upon the relation of Howard C. Johnson, Bank Commissioner, Plaintiff,
vs.
R. M. Cook, Defendant.

Motion for leave to file complaint.

[May 23, 1938.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The State of Oklahoma, upon the relation of its Bank Commissioner, asks leave to bring suit in this Court to enforce the statutory liability of a shareholder of a state bank which is in course of liquidation.

The statutes of Oklahoma provide that the shareholders of every bank organized under the state law "shall be additionally liable for the amount of stock owned". Okla. Stat. 1931, sec. 9130. The Bank Commissioner, when satisfied of the insolvency of a bank, may take possession of its assets and "proceed to wind up its affairs and enforce the personal liability of the stockholders". *Id.*, sec. 9172. That liability becomes due when the Bank Commissioner takes possession of the bank and his order finding the bank to be insolvent is conclusive evidence of that fact. *Id.*, sec. 9174. The Bank Commissioner is authorized to "prosecute all suits necessary for the liquidation of the assets of the insolvent corporations taken over by him" and such suits are to be brought "in the name of the State of Oklahoma, on the relation of the Bank Commissioner". If, after liquidation and payment in full of depositors and creditors, any assets remain in the hands of the Bank Commissioner, they revert t stockholders. *Id.*, sec. 9173.

The statutes further provide t "The State of Oklahoma, on the relation of the Bank Commissioner, shall be deemed to be the owner of all of the assets of failed banks in his hands for the use and benefit of the depositors and creditors of said bank". *Id.*, sec. 9179.

No costs are required to be paid by the State in any suit in which the State of Oklahoma, on the relation of the Bank Commissioner, is a party, and preference is directed to be given in the courts of the State to all matters pending in such suits. *Id.*

The proposed complaint alleges that in May, 1931, the Bank Commissioner took possession of the Osage Bank of Fairfax, Osage County, finding it to be insolvent, and proceeded to wind up its affairs and enforce the personal liability of its stockholders; that the defendant, R. M. Cook, was the owner of sixty-nine shares of the capital stock of the bank of the par value of $100, and became liable to the State of Oklahoma, upon the relation of its Bank Commissioner, in the sum of $6900, with interest; that the defendant has paid the sum of $2300 in part satisfaction and that the balance is due; that the Bank Commissioner has liquidated all the assets of the bank except the claim here presented and certain other claims against other stockholders; that dividends have been paid to depositors and creditors amounting to ninety-one per cent. of their claims and that the enforcement of the statutory liability of the defendant is necessary to discharge the liabilities of the bank.

In answer to the rule to show cause why leave to bring this suit should not be granted, the proposed defendant contends that the cause of action is not within Article III, Section 2, Clause 2, of the Constitution providing for the original jurisdiction of this Court.

The purpose in creating the stockholder's liability, the authority conferred upon the Bank Commissioner to enforce it, and the relation of the State to its enforcement, are clearly set forth in the decisions of the Supreme Court of Oklahoma. In *State ex rel. Mothersead* v. *Kelly,* 141 Okla. 36, the court said:

"What is this stockholder's liability and for whose benefit is it created?

"It was designed solely for the benefit of creditors and constitutes a fund available only when the bank is insolvent and thus rendered unable to meet its liabilities in full. The corporation itself has no authority over the fund and cannot either compel its payment or by any act on its part release the stockholder therefrom. It amounts, for all practical purposes, to a reserve or trust fund, to be resorted to only in proceedings in liquidation, when necessary to meet the payment of obligations of the corporation.

It is limited to an amount equal to the par value of the stock held and owned by each stockholder and exists in favor of the creditors collectively, not separately, and in proportion to the amount of their respective claims against the corporation. . . ." (*Id.*, pp. 37, 38.)

The court added that "the Bank Commissioner alone is empowered by law to prosecute an action to enforce the stockholders' liability". *Id.*, p. 41. See also *American Exchange Bank* v. *Rowsey*, 143 Okla. 172, 173; *Griffin* v. *Brewer*, 167 Okla. 654, 655.

In *State ex rel. Murray* v. *Pure Oil Co.*, 169 Okla. 507, referring to the provision of the statute authorizing the Bank Commissioner to institute all suits necessary for the liquidation of the assets of the insolvent corporations taken over by him and providing that such suits shall be brought in the name of the State, on the relation of the Bank Commissioner, the court said:

"Since the state is the proper party plaintiff by virtue of the above statute, it may maintain the action regardless of whether it is the real party in interest or merely a nominal plaintiff for the use and benefit of depositors and creditors. An action may be maintained by one expressly authorized by statute even though that person is not in fact the real party in interest. Section 144, O. S. 1931. . . .

"The protection of depositors of insolvent state banks is a distinct economic policy of the state. . . . In so far as the object of this action is to further the established economic policy of the state, the state may be said to have a real interest created by its governmental policy, as distinguished from a mere nominal interest, even though the pecuniary benefits of the litigation, if ultimately successful, go to the depositors and creditors of the insolvent bank.

"The statute (section 9173, *supra*) which authorizes the state to be a party plaintiff names the Bank Commissioner as the proper officer to institute legal actions and carry out this economic policy. . . .

"The nature of the powers vested by law in the Bank Commissioner have been many times considered by this court and their exclusive character recognized. . . .

"It was the legislative intent that litigation of this character should be instituted and conducted under the direct supervision of the Bank Commissioner through the staff of legal assistants provided by law for that purpose, and not by the Governor, nor through independent action". *Id.*, pp. 509-512.

Again, in *Richison* v. *State ex rel. Barnett,* 176 Okla. 537, 539, the court observed:

"Under the provisions of article 6, chapter 40, O. S. 1931 (sec. 9168 *et seq.*) the state has assumed exclusive jurisdiction and control of the affairs of insolvent banking institutions. By operation of law the Bank Commissioner is the officer through which the state liquidates the assets and winds up the affairs of such institutions. While engaged in the performance of such statutory duties and functions the Bank Commissioner is performing duties for the benefit of certain members of the public who were depositors in such institution."

The state court has also held that the statute of limitations does not run against the State in an action to enforce the statutory liability of the stockholders. *State ex rel. Shull* v. *McLaughlin,* 159 Okla. 4. And the same rule applies to actions on promissory notes and other claims taken over by the Bank Commissioner as assets of an insolvent bank. *White* v. *State,* 94 Okla. 7; *Lever* v. *State,* 157 Okla. 162; *Richison* v. *State ex rel. Burnett, supra.*

May the State through its Bank Commissioner invoke our original jurisdiction to prosecute claims of this character for the benefit of creditors?

To bring a case within that jurisdiction, it is not enough that a State is plaintiff. *Florida* v. *Mellon,* 273 U. S. 12, 17. Nor is it enough that a State has acquired the legal title to a cause of action against the defendant, where the recovery is sought for the benefit of another who is the real party in interest. *New Hampshire* v. *Louisiana, New York* v. *Louisiana,* 108 U. S. 76. In those cases, provision was made by statutes of New Hampshire and New York for the assignment to the State of the obligations of another State. Thereupon it became the duty of the Attorney General of the State, if in his opinion the claim was a valid one, to bring suit in the name of the State in this Court in order to enforce collection. The money collected was to be held in trust, as stated, and to be paid over to the assignor of the claim. *Id.,* pp. 77, 79. The States, respectively, acquired title to bonds of the State of Louisiana and filed in this Court bills in equity in the name of the State to enforce recovery. The bills were dismissed. The fact that the effort was made to use the name of the complainant States in order to evade the application of the Eleventh Amendment was undoubtedly a controlling consideration, but that consideration derived

its force from the fact that the State was not seeking a recovery in its own interest, as distinguished from the rights and interests of the individuals who were the real beneficiaries.

The underlying point of the decision was that in determining the scope of our original jurisdiction under Clause 2 of Section 2 of Article III of the Constitution, we must look beyond the mere legal title of the complaining State to the cause of action asserted and to the nature of the State's interest. So, when it appeared in a later case that a State, invoking the original jurisdiction of this Court to enforce the bonds of another State, was the absolute owner of the bonds and was prosecuting the claim upon its own behalf, this Court took jurisdiction. *South Dakota* v. *North Carolina,* 192 U. S. 286. There the Court found that, while the State of South Dakota acquired by gift the bonds of North Carolina, there could not be "any question respecting the title of South Dakota". They were not held, the Court said, by the State as representative of individual owners as in the case of *New Hampshire* v. *Louisiana,* 108 U. S. 76, and the motive which induced the transaction was not deemed to "affect its validity or the question of jurisdiction". The case was thus one "directly affecting the property rights and interests of a State". *Id.,* pp. 314, 318.

In determining whether the State is entitled to avail itself of the original jurisdiction of this Court in a matter that is justiciable (see *Massachusetts* v. *Mellon,* 262 U. S. 447, 485), the interests of the State are not deemed to be confined to those of a strictly proprietary character but embrace its *"quasi-sovereign"* interests which are "independent of and behind the titles of its citizens, in all the earth and air within its domain". *Georgia* v. *Tennessee Copper Company,* 206 U. S. 230, 237. Thus, we have held that a State may sue to restrain the diversion of water from an interstate stream (*Kansas* v. *Colorado,* 206 U. S. 46, 95, 96) or an interference with the flow of natural gas in interstate commerce (*Pennsylvania* v. *West Virginia,* 262 U. S. 553, 592); or to prevent injuries through the pollution of streams or the poisoning of the air by the generation of noxious gases destructive of crops and forests, whether the injury be due to the action of another State or of individuals (*Missouri* v. *Illinois,* 180 U. S. 208, 200 U. S. 496; *Georgia* v. *Tennessee Copper Company, supra; North Da-*

kota v. *Minnesota*, 263 U. S. 365, 373, 374; *Wisconsin* v. *Illinois*, 278 U. S. 367, 281 U. S. 179).

But this principle does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy. In *Kansas* v. *United States*, 204 U. S. 331, the State asked leave to file a bill of complaint against the United States and others, seeking a decree adjudging the State to be the owner, as trustee for a railway company, of certain sections of land to the extent of a grant along the line of the railroad through the Creek Nation in the Indian Territory. The Court said that it appeared upon the face of the bill that the State was only nominally a party, that the real party in interest was the railroad company, and that our original jurisdiction "could not be maintained". *Id.*, pp. 340, 341. The Court also held that the United States was the real party in interest as defendant and could not be sued without its consent, but the other question was presented and passed upon.

In *Oklahoma* v. *Atchison, Topeka & Santa Fe Railway Co.*, 220 U. S. 277, the State sought to maintain an action in this Court against the carrier to restrain it from charging unreasonable rates within Oklahoma. Setting forth the congressional grant under which the railway in question was operated and insisting that the Company was not entitled to charge the inhabitants of Oklahoma a greater freight rate for the transportation of certain commodities than that authorized for similar service in Kansas, the State alleged its interest in the development of its communities and in the success of its industries, and the menace to the future of the State through what was deemed to be a violation of the conditions of the grant. But the Court pointed out that the State was not seeking to protect a direct interest of its own in the transportation of the commodities in question, but was endeavoring to compel the railway company to respect the rights of the shippers of these commodities. *Id.*, pp. 286, 287. The bill was dismissed. The Court summarized its conclusion in these words:

"We are of the opinion that the words, in the Constitution, conferring original jurisdiction on this court, in a suit 'in which a State shall be a party' are not to be interpreted as conferring

such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers, generally". *Id.*, p. 289.

See, also, *Louisiana* v. *Texas*, 176 U. S. 1.

In the instant case, the State has taken the legal title to the assets of the insolvent bank which is being liquidated and to the claims against stockholders by reason of their statutory liability. But recovery is sought solely for the benefit of the depositors and creditors of the bank. *State ex rel. Mothershead* v. *Kelly, supra; State ex rel. Murray* v. *Pure Oil Co., supra; Richison* v. *State ex rel. Barnett, supra.* Constituting the State a virtual trustee for the benefit of the creditors of the bank did not alter the essential quality of the rights asserted or avail to confer jurisdiction upon this Court to entertain a suit for their enforcement. *New Hampshire* v. *Louisiana; New York* v. *Louisiana, supra; Kansas* v. *United States, supra; Oklahoma* v. *Atchison, Topeka & Santa Fe R. R. Co., supra.* The taking of the legal title by the State is a mere expedient for the purpose of collection.

It will be noted that the State not only undertakes to enforce the statutory liability of stockholders but, as the State takes title to all the assets of the insolvent bank, suits upon promissory notes and various claims of the bank in the course of the liquidation are to be brought in the name of the State acting through its Bank Commissioner. The declared policy and asserted economic interest of the State attach as well to the prosecution of all such suits. If the contention of the State were accepted, it would follow that suits upon claims of the bank against citizens of other States could be brought in this Court. Many States have statutory provisions for the liquidation through state officers of insolvent banks, trust companies, insurance companies, etc., and if, by the simple expedient of providing that the title to the assets of such institutions should vest in the State and that suits in the course of liquidation should be prosecuted in the name of the State, resort to our original jurisdiction were permitted, the enormous burden which would thereby be imposed upon this Court can readily be imagined,—a burden foreign to the purpose of the constitutional provision. These considerations emphasize the importance of

strict adherence to the governing principle that the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest.

The motion for leave to file complaint is denied.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.